APPENDIX.

In the United States Circuit Court of Appeals.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Coughran vs. State Farm Mutual Auto Insurance Co., a corporation.

Dissenting Opinion—Filed July 26, 1937.

WILBUR, Circuit Judge, dissenting:

". . . In view of the statutory definition of what constitutes an operator, namely, one in actual physical control of a motor vehicle, (Cal. Motor Vehicle Act, Secs. 1, 18, *supra*), and in view of the purpose of the law to protect the public from the lack of judgment and skill of a young child, it seems clear that the child was driving the automobile in the case at bar within the meaning of that term as defined in the statutes of California and, consequently, was violating the law of California, and that the wife also who, in a legal sense had control of the car, was violating the statute by permitting the child to operate the car. Therefore, whether we consider the question from the standpoint of the action of the child or of the wife the car was operated in violation of law as to age and driving license. If it was operated in violation of such a law the policy expressly provides that there shall be no liability on the part of the Insurance Company. If we assume, as the court found, that the car was being jointly operated and that the child had no control of some part of the driving mechanism, and the wife had control of another portion, it is still true that each was violating the provisions of the law—the child by driving the car and the wife by permitting her to do so. . . ."

O'Connell vs. New Jersey Fidelity and Plate Glass Co. (*supra*, page 28).

HINMAN, J. (dissenting):

". . . The fair interpretation of the provision of the policy in question is that the policy did not cover any accident which was proximately caused by the automobile being driven by a person under the age of 16 years. If the facts show that that was the situation involved here, the plaintiff cannot recover. The driving of a car requires more than guiding its course on the highway. It must be deemed to include the control of the motive power and the brakes. To control these, to be able to regulate the amount of power, to be able to connect and disconnect such power instantaneously, and to be able to retard or stop the car in any emergency by the application of brakes, is just as much a part of driving the car, in any fair acceptance of the term, as is the holding of the wheel.

"In my judgment, the control of the former is more essential to the avoidance of accident than the latter. The purpose and the natural meaning of the provision was to eliminate insurance against accident that might arise from the negligent management of any or all of these instruments which are utilized in the driving of a car. How can we say that the grandfather was driving this car? He was only in control of the direction which it took in its progress on the highway, and only imperfectly in the control of the wheel, because, obviously, his seat at the right of the wheel, instead of in back of it, was a disadvantageous one. He was not in control of the foot throttle, which regulated the flow of gas. He was not in control of the clutch, which disconnected the engine from the driving shaft. He was not in control of the service brake, which is the powerful brake of a car. His position

was disadvantageous to control even the hand brake and at the same time to guide the wheel. The most that can be said is that the driving of the car was divided between the grandfather and his 14-year-old granddaughter, for the reason that she released her hold on the wheel. Can a person be deemed any the less the driver of a car within the meaning of the provision of the policy, by simply releasing the wheel to another? I am inclined to take the position that she cannot. I believe that comes within the risk that was not intended to be covered. The very thing which happened here is the thing which naturally would flow from permitting a child of that age to sit in the driver's seat. In any emergency, an adult at her side would naturally grasp the wheel and, not being in a position in such an emergency to exercise the best judgment, or to execute it from lack of ability to control all of the mechanism of the car, frequent accidents are likely to arise, which would not arise if a person of such age had not been permitted to occupy the driver's seat.

"I think it is too narrow a construction of the language used to hold that the person managing the wheel is driving the car. The proper interpretation of the clause in question is that the policy does not cover an accident which has been proximately caused by the driving of a car by a person under the age of 16 years. It seems to me that the proximate cause of this accident was the driving of the car by a girl of 14 years, and that the act of the grandfather must be considered as an act set in operation by the primary cause, namely, having permitted a girl of those years to drive the car. His act was merely a continuation of the original act, and the accident was the probable consequence of having permitted this girl to drive the car, within the authority of Lowery v. Manhattan R. R. Co., 99 N. Y. 158, 1 N. E. 608, 52 Am. Rep. 12, and Pollett v. Long, 56 N. Y. 200. . . ."